

THE UNITED STATES' FAILURE TO RATIFY THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: MUST THE POOR BE ALWAYS WITH US?

ANN M. PICCARD*

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“In the context of global poverty, the cultures of indifference, passivity, and inaction that underlie the failure to address global poverty have themselves been reinforced and perpetuated by theoretical perspectives that fail to give adequate weight to global poverty as a human rights concern.”¹

“Human rights law functions best when it acts with cognizance of context and awareness of the cultural and national determinants by which the

* Prof. of Legal Skills, Stetson University College of Law. I am grateful to Prof. Ezra Rosser of American University's School of Law for allowing me to present this Article as a work in progress at the Law and Economic Mobility Conference in October, 2009, and to the participants at that conference who helped me focus on these issues. Thanks also to Prof. Jamie Fox for permitting me to discuss this Article with the faculty at a Stetson Law mini-workshop, and to the students in Stetson's International Distributive Justice Seminar in Summer 2010, whose interest and intellectual curiosity greatly facilitated the writing of this Article. This paper was written with the support of a research grant from the College of Law.

1. POLLY VIZARD, POVERTY AND HUMAN RIGHTS: SEN'S 'CAPABILITY PERSPECTIVE' EXPLORED 1 (2006).

very concept of human rights can plausibly enter the domains of commonly shared values.”²

I. MUST THE POOR BE ALWAYS WITH US?³

In 1977, President Jimmy Carter signed the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴ In the intervening years, now well over a generation later, no discernable progress has been made toward ratification.⁵ The United States currently stands among dubious company in its failure to move forward with this fundamental human rights instrument.⁶ Furthermore, in the forty years since the United States government declared “War on Poverty,” the gap between the rich and the poor in this country has grown larger rather than smaller.⁷ In the face of ineffective domestic approaches to ending or

2. Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 265–66 (2004).

3. See Matthew 26:11 (King James) (“For ye have the poor always with you; but me ye have not always.”). The full quote, attributed to Jesus, is sometimes cited as: “The poor you will always have with you, but you will not always have me,” in reference to Deuteronomy 15. Whether this means we should accept and tolerate poverty as inevitable is debatable. See, e.g., Bryant L. Myers, *Will the Poor always be with Us?*, JOHN MARK MINISTRIES (May 5, 2003), www.jmm.aaa.net.au/articles/1720.htm (pointing out that the referenced section in Deuteronomy states unambiguously that “There should be no poor among you”). For an interesting view of human rights as a biblical rather than a secular notion, see Gordon Butler, *The Essence of Human Rights: A Religious Critique*, 43 U. RICH. L. REV. 1255 (2008).

4. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

5. “Since that time, however, the ratification process has remained virtually dormant, although human rights and other groups have urged, from time to time, that it be reactivated.” Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM J. INT’L L. 365, 365–66 (1990). Furthermore, the Obama administration did not include ICESCR in the list of treaties forwarded to the Senate for consideration in 2009; the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) was included, but no action has been taken as of this writing. See Letter from Richard R. Verma, Assistant Sec’y Legislative Affairs, to John F. Kerry, Chairman, Committee on Foreign Relations, United States Senate (May 11, 2009), *available at* http://www.gc.noaa.gov/documents/gcil_bd_2009TreatyPriorityList.pdf.

6. Other non-ratifying U.N. member states are Belize, Comoros, Cuba, Sao Tome and Principe, and South Africa. International Covenant on Economic, Social and Cultural Rights, *Declarations and Reservations adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

7. *Recession Widens Gap Between Rich and Poor Even Further*, NYDailyNews.com, Oct. 1, 2009, http://www.nydailynews.com/money/personal_finance/2009/09/29/2009-09-29_recession_hit_middleincome_and_poor_families_hardest_widening_the_economic_gap_b.html.

The wealthiest 10 percent of Americans—those making more than \$138,000 each year—earned 11.4 times the roughly \$12,000 made by those living near or below the

even reducing poverty in the United States,⁸ it may be time for those who advocate on behalf of the poor in this country to focus on ratification of international instruments, and internalization of international norms, in order to address the problems that poverty creates for those who live in the United States, a nation of indisputable wealth.

This Article proposes that if the United States is to move toward ratification of any human rights treaty, it ought to be the ICESCR. Even though the United States has historically been reluctant to fully commit to international human rights instruments,⁹ ICESCR ought to be palatable, and thus potentially effective, in light of its system of “progressive realization”¹⁰ of the treaty’s ultimate goals of equality for all. The treaty’s requirements are to be met over a period of time, according to the abilities of each member state.¹¹ This ought to eliminate any potential concerns about interference with the United States’ sovereignty,¹² as well as practical concerns about the methods, costs, and means of implementing the treaty. There is no good reason for the United States to abstain from ratifying the ICESCR, while there are many good reasons supporting ratification and enactment of implementing legislation. If the United States ratifies no other human rights treaty this century, it ought to ratify the ICESCR.

poverty line in 2008, according to newly released census figures. That ratio was an increase from 11.2 in 2007 and the previous high of 11.22 in 2003.

Id.; see also Elizabeth Gudrais, *Unequal America: Causes and Consequences of the Wide—and Growing—Gap Between Rich and Poor*, HARV. MAG., July–Aug. 2008, at 22, available at <http://harvardmag.com/pdf/2008/07-pdfs/0708-22.pdf>.

[I]n the United States, the gap between the rich and the poor is far wider than in most other developed democracies, and it is getting wider. That is true both before and after taxes: the United States also does less than most other rich democracies to redistribute income from the rich to the poor.

Elizabeth Gudrais, *Unequal America: Causes and Consequences of the Wide—and Growing—Gap Between Rich and Poor*, HARV. MAG., July–Aug. 2008, at 22, available at <http://harvardmag.com/pdf/2008/07-pdfs/0708-22.pdf>.

8. See Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 145 (2006).

9. NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 1–36 (1990).

10. See Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113, 113–21 (2008). Ms. Young refers to the “notoriously indeterminate claims of economic and social rights” in her analysis of the viability of a “minimum core” of rights. *Id.* at 114 (inquiring whether economic and social rights are relative or absolute, i.e., are they the same in Malawi as in Canada?).

11. International Covenant on Economic, Social and Cultural Rights, art. II, ¶ 1, adopted Dec. 16, 1966, 993 U.N.T.S. 3.

12. NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 44 (1990).

Part II of this Article provides the context and content of the ICESCR, including its status in the United States. Part III examines the current status of poverty in the United States, and current attempts to address poverty through domestic remedies and legislation. Part IV demonstrates some of the ways in which the ICESCR could effectively address the problems currently faced by poor people in the United States. Finally, this Article reaches two conclusions from which a solution may follow: there is no legitimate reason for poverty to persist in this country, and the United States is simply out of synch with the rest of the world in its legal approach to poverty. We need not accept poverty as an inevitable fact of life in this country; with the proper legal tools and internalization of the proper norms, we may find that, in fact, we need not always have the poor with us.

II. ICESCR: THE POTENTIAL FOR CHANGE

“Poverty is not a certain small amount of goods, nor is it just a relation between means and ends; above all it is a relation between people. Poverty is a social status.”¹³

Even before the economic downturn that occurred in the fall of 2008, poverty rates in the United States were climbing: the U.S. Census Bureau estimated between 2007 and 2009, the number of people living in poverty in this country increased by 6.3 million.¹⁴ Poverty in this country is measured in pre-tax dollars of income, without consideration for geographic variations.¹⁵ Poverty in the United States manifests itself in many ways,

13. Marshall David Sahlins, *The Original Affluent Society*, in *STONE AGE ECONOMICS* 1 (1972), available at <http://staffwww.fullcoll.edu/amande/sahlins.pdf>. Much of the discussion that follows rests on an understanding that poverty should be understood to mean more than a certain amount of U.S. dollars earned per day. See, for example, *How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/about/overview/measure.html> (last updated Sept. 16, 2010) and *INTERNATIONAL POVERTY LAW: AN EMERGING DISCOURSE* (Lucy Williams ed., 2006). “Poverty is about not only income levels, but also the lack of freedom that comes from physical insecurity.” JACQUELINE NOVOGRATZ, *THE BLUE SWEATER* 245 (2009).

14. CARMEN DENAVAS-WALT ET. AL., U.S. CENSUS BUREAU, *CURRENT POPULATION REPORTS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009* 14 (2009), <http://www.census.gov/prod/2010pubs/p60-238.pdf> (indicating how the 2007 economic downturn impacted poverty rates in the United States).

15. U.S. Census Bureau—Poverty Highlights, <http://www.census.gov/hhes/www/poverty/about/overview/measure.html> (last updated Sept. 16, 2010) (explaining how the Census Bureau measures poverty). It is possible that the Obama administration will re-evaluate the way in which poverty is measured. See Reid Cramer, *Revising the Poverty Measure and a Better Way to Count the Poor*, *HuffingtonPost.com*, (Apr. 12, 2010, 10:43 AM), http://www.huffingtonpost.com/reid-cramer/revising-the-poverty-meas_b_533948.html. “[P]overty is not just about income. Poverty also entails limits on opportunity, information, and resources.” *Id.* Mr. Cramer is the Director of the Asset Building Program of

including inadequate health care, food, and shelter. Every day, millions of citizens have too little to eat and nowhere safe to sleep. Meanwhile, as far back as 2004, “[a]n estimated 2.7 million U.S. adults . . . had gross assets of \$1.5 million or more.”¹⁶ In a nation of such vast wealth, the disparity between the rich and the poor is at the very least unsettling. Now, more than ever, the United States needs to address poverty by ratifying ICESCR.

“[T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”¹⁷ Part I of the ICESCR articulates the right of “peoples” (as opposed to persons) to self-determination, meaning the right to “freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸ Part II significantly provides that state parties are to implement measures “progressively” toward meeting the treaty’s requirements: each member state is to take measures “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”¹⁹ This provision for progressive implementation is a unique feature of the ICESCR, and one that ought to make the Covenant more palatable not just to developing states with limited resources, but also to the resource-rich United States.²⁰ Equality and non-discrimination are also guaranteed by Article 2, although developing states are given the right to choose the extent to which non-nationals will be protected by the Covenant.²¹

the New America Foundation, a “left-leaning” policy institute and think tank located in Washington, D.C. *Id.*

16. *SOI Tax Stats—2004 Personal Wealth Table*, IRS.gov, <http://www.irs.gov/taxstats/article/0,,id=185880,00.html> (last updated Aug. 3, 2010).

17. International Covenant on Economic, Social and Cultural Rights, Preamble, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

18. *Id.* at art. I, ¶ 1.

19. *Id.* at art. II, ¶ 1.

20. It is, in fact, this progressive implementation that makes ICESCR uniquely immune from many of the features that make other human rights treaties ineffective. However, this same feature has been said to raise “the most technically complex and politically controversial issue pertaining to the Covenant: the precise scope and nature of its various obligations clauses.” Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM J. INT’L L. 365, 369 (1990). Thus, the progressive implementation provision may be viewed as either a strength or a weakness of ICESCR. This Article suggests that it is the latter rather than the former.

21. International Covenant on Economic, Social and Cultural Rights, art. II & III, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

Part III of the Covenant recognizes the right to work at "full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."²² It requires state parties to provide educational and vocational opportunities "to achieve steady economic, social and cultural development."²³ The adequacy of pay is addressed in Article 7, which mandates "equal pay for equal work," particularly for women; remuneration sufficient for workers to earn "[a] decent living for themselves and their families"; "[s]afe and healthy working conditions;" equal opportunity for promotions based on seniority; and "[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."²⁴ Article 8 specifies the right to unionize and the protections to be afforded unions.²⁵ Article 9 recognizes "the right of everyone to social security, including social insurance."²⁶

Article 10 addresses the significance and role of the family in relation to economic, social, and cultural rights.²⁷ Families with children, and mothers, are particularly protected.²⁸ Paid maternity leave and the freedom to marry whom one chooses are also guaranteed.²⁹

Article 11 echoes the Universal Declaration of Human Rights (UDHR) in recognizing "the right of everyone to an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions."³⁰ It further recognizes

22. *Id.* at art. VI, ¶ 2. This is just one of several places in which ICESCR draws an explicit connection between social and cultural rights, on the one hand, and civil and political rights on the other. *See id.* The relationship between these two different "types" of rights seems to be so close that they are virtually inseparable in practice, as well they should be, even though civil and political rights are more specifically addressed in the International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 19, 1966, S. Treaty Doc. No. 95-20,999 U.N.T.S. 171, to which the United States became a party by President Carter's signature in 1977 and Senate ratification in 1992 (during President Clinton's time in the White House). For more on the rights addressed in the ICCPR, see Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT'L LEGAL STUD. 57 (1999).

23. International Covenant on Economic, Social and Cultural Rights, art. VI, ¶ 2, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

24. *Id.* at art. VII.

25. *Id.* at art. VIII.

26. *Id.* at art. IX.

27. *Id.* at art. X.

28. International Covenant on Economic, Social and Cultural Rights, art. X, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3. Child labor is also addressed in Article 10.

29. Arranged or forced marriages are still common in many parts of the world.

30. *Id.* at art. XI. In the United States there is no right to housing. The ramifications of this distressing situation are thoroughly analyzed in Kristen Adams, *Do We Need a Right to Housing?*, 9 NEV. L. J. 275, 275 (2009).

“the fundamental right of everyone to be free from hunger,” and thus requires state parties to “improve methods of production, conservation and distribution of food . . . [and] to ensure an equitable distribution of world food supplies in relation to need.”³¹

Article 12 addresses “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³² Article 13 addresses the right to education and Article 14 requires that the education be free, and provides a two-year timeframe within which state parties are to begin formulating a detailed, progressive implementation plan.³³ Completing Part III, Article 15 recognizes the “right of everyone . . . [t]o take part in cultural life,” which is described as encompassing access to scientific developments and “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”³⁴ Parts IV and V address the implementing and monitoring aspects of the Covenant.³⁵

III. U.S. POVERTY TODAY: THE POOR ARE WITH US

A. *Law, Poverty, and Litigation*

Poverty has been described as “a human condition characterized by a sustained or chronic deprivation of the resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.”³⁶ In the United States today, poverty crosses all demographic lines, and

31. International Covenant on Economic, Social and Cultural Rights, art. XI, ¶ 2, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3. The significance of requiring equitable distribution of food according to need cannot be overstated. See AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* 1 (1982), citing Amartya Sen’s observation that allowing people to starve in the modern world is deplorable.

32. International Covenant on Economic, Social and Cultural Rights, art. XII, ¶ 1, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

33. *Id.* at art. XIII.

34. *Id.* at art. XV, ¶ 1.

35. See *id.* at art. XVI-XXXI. Like most international conventions, ICESCR does not permit individuals to complain about non-compliance; the Covenant is an agreement between nations rather than between citizens and their governments, so only a state may complain about another state’s noncompliance. There is an Optional Protocol to the ICESCR that would permit individual complaints, but only 32 states have signed the Optional Protocol as of this writing. See *Committee on Economic, Social and Cultural Rights*, <http://www2.ohchr.org/english/bodies/cescr/> (last visited Sept. 11, 2010). The United States, obviously, has not signed the Optional Protocol as it is not yet a party to the Covenant itself.

36. Statement Adopted by the Committee on Economic, Social and Cultural Rights ¶ 8, May 4, 2001, *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/518e88bfb89822c9c1256a4e004df048?OpenDocument>.

affects citizens and non-citizens alike without regard for race, sex, ethnicity, age, religion, or other identifying characteristic.³⁷ Poverty manifests itself in a lack of adequate food, housing, and health care.³⁸ Able-bodied people who want to work cannot find employment that pays a living wage; low-wage earners might work two or even three jobs a day in an effort to get by.³⁹ Many states provide little or no “safety net” for the poor, and the federal government has reduced or eliminated many forms of welfare.

The United States Constitution is the source of all rights in this country, and is generally viewed as an instrument of negative rather than positive rights.⁴⁰ The Constitution thus tells us what the government may not

37. For a description of the method by which poverty in America is measured, see Susan R. Jones, *Dr. Martin Luther King, Jr.'s Legacy: An Economic Justice Imperative*, 19 WASH. U.J.L. & POL'Y. 39, 42 n.11 (2005). We may never know the true extent of poverty in the United States because, as Prof. Jones writes, “many believe that the government’s poverty statistics are flawed because they do not account for low wage workers or reflect the real depth of poverty in America.” *Id.* (citing Sharon M. Dietrich, *When Working Isn’t Enough: Low-Wage Workers Struggle to Survive*, 6 U. PA. J. LAB. & EMP. L. 613, 619-21 (2004)). One common example of the under-counting of America’s poor occurs when census results fail to record as homeless the many people in the United States who have moved in with friends or family, sleeping on floors or couches, because they have no homes of their own. The phenomenon of uncounted homelessness can be seen by the increasingly popular use of the term “couch surfing,” which has its own entry in Wikipedia, the online “encyclopedia” that is created and modified by ordinary people rather than solely by experts. *CouchSurfing*, WIKIPEDIA, <http://en.wikipedia.org/wiki/CouchSurfing> (last visited Dec. 18, 2010).

38. In many parts of the United States, poverty is also manifested by a lack of some reliable form of transportation. Many parts of the country have little or no public transportation, which can compound the difficulty of finding adequate employment. See generally BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 196–201 (2001). Also, “3.5 percent of U.S. households experience hunger. Some people in these households frequently skip meals or eat too little, sometimes going without food for a whole day. 9.6 million people, including 3 million children, live in these homes.” Samana Siddiqi, *Statistics on Poverty & Food Wastage in America*, SoundVision.Com, <http://soundvision.com/utills/print.asp?url=/info/poor/statistics.asp> (last visited on Oct. 11, 2010).

39. See generally LIVING WAGE CALCULATOR—INTRODUCTION TO THE LIVING WAGE CALCULATOR, www.livingwage.geog.psu.edu (last visited Dec. 18, 2010). “In many American communities, families working in low-wage jobs make insufficient income to live locally given the local cost of living. [Advocates] have successfully argued that the prevailing wage offered by public sector and key businesses should reflect a wage rate required to meet minimum standards of living.” *Id.*

40. See Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 139 (2006) (footnote omitted). Ms. Gabrielidis advocates the use of state rather than federal courts in litigating issues of human rights because state constitutions tend to offer greater guarantees of basic human rights than does the federal constitution. *Id.* at 140. Unfortunately, not all state constitutions provide more protection; most of the cases cited in support of her thesis are from California, which does provide a General Assistance pro-

do rather than what it must do. This distinction between negative and positive rights is important in terms of poverty because it means that the United States government is not required to guarantee an adequate standard of living or any sort of public assistance.⁴¹ In connection with this notion of negative and positive rights, it has been noted that “for the most part only negative rights are justiciable, with the positive rights left to the vagaries of politics.”⁴² In this context, it is easy to see why advocates for the poor in this country have been only marginally successful in securing any guarantees of government assistance for their clients.⁴³ The

gram for the poor. *Id.* at 165–69, 177. However, the Supreme Court of Connecticut, in a concurring opinion by Chief Justice Peters in *Moore v. Ganim*, concluded that a right to welfare was found in Connecticut’s Constitution. *Id.* at 170. A state like Florida, that does not have a general assistance statute and does not provide for a right to welfare in the state constitution, may be no more receptive to a human rights claim than would be a federal court. For an in-depth discussion of using domestic and international remedies in an effort to establish a right to shelter for children, see Katherine Barrett Wiik, *Justice for America’s Homeless Children: Cultivating a Child’s Right to Shelter in the United States*, 35 WM. MITCHELL L. REV. 875 (2009).

41. See Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 139–40 (2006).

Despite the fact that the U.S. Supreme Court . . . has firmly held that the Constitution does not provide a right to education, adequate housing, or welfare benefits, these are basic tenets of [international human rights law] . . . [T]he Government, without violating anyone’s Constitutional rights, may choose to cut funds or even abandon the program entirely.

Id. (footnotes omitted). Interestingly, while there is no right to public benefits, once those benefits are conferred, a recipient does generally have a right to some form of hearing before the benefits may be reduced or terminated. See *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

42. Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1766 (2008). Prof. Posner explains it this way:

The ICCPR is a charter of negative rights, whereas the ICESCR is a charter of positive rights. Negative rights are rights to be free of interference from other people and from the government Positive rights are rights to receive benefits from the government Negative rights are associated with the classic liberal tradition of natural law, especially as embodied in the social contract theories of Locke and his successors, including the founders of the United States of America, who were particularly concerned about government abuse of power. Positive rights are associated with a range of liberalism’s critics, including Marxists.

Id. at 1764–65.

43. “[W]e Americans are apt to frame our struggles in the language of competing rights and to fight our battles in a legal forum. Perhaps Thomas Paine sealed our legalistic fate over 200 years ago when he decreed that, in America, law would be king.” Paul Schiff Berman, Essay, *An Observation and a Strange but True “Tale”: What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 HASTINGS L.J. 123, 124 (2000) (citing THOMAS PAINE, *Common Sense*, reprinted in THE COMPLETE WRITINGS OF THOMAS PAINE 1, 29 (Philip S. Foner ed., 1969) (1945)). There

question then is whether ratification of the ICESCR might provide any justiciable rights for poor people in the United States.

On its face, the ICESCR guarantees most of the benefits advocates for the poor have been seeking in this country for the past forty years. Education, living wages, health care, housing, and child care are all guaranteed under the ICESCR. The ICESCR is not, of course, a panacea, and it has been criticized because “though it insists on generous positive rights, [it] allows states to take their time before satisfying them.”⁴⁴ There is certainly much room for debate about why or even whether state parties comply with any human rights treaties,⁴⁵ and the ICESCR is no exception to this discussion. However, the fact remains that currently there is no source in American law that might support a poor person’s right to an adequate standard of living.⁴⁶ The ICESCR would correct that omission. Instead of taking the piecemeal approach that has unfortunately been the only method available, by and large, for those who advocate on behalf of the poor,⁴⁷ the ICESCR would provide a comprehensive set of positive

may be drawbacks associated with seeking, or expecting, a legal resolution for every dispute, as Prof. Berman notes, but that does not stop Americans from believing that the answers to our problems lie in the law. *Id.*

44. Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1768 (2008). Prof. Posner calls the ICESCR “a highly unsatisfactory instrument for implementing the capabilities approach” advocated initially by Amartya Sen in *DEVELOPMENT AS FREEDOM* (1999). *Id.*

45. This issue has been addressed, for example, in my article entitled *U.S. Ratification of CEDAW: From Bad to Worse?*, 28 L. & INEQ. 119 (2010), in which I cite and discuss the work of Prof. Oona Hathaway, whose extensive empirical research indicates that ratification of international human rights instruments may decrease, rather than increase, a nation’s human rights performance. See generally Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935 (2002); ABRAM CHAYES & ANTONIO HANDLER CHAYES, *THE NEW SOVEREIGNTY* 112 (1995), noting that

[T]he mere existence of a treaty does not ensure automatic compliance by the parties that have assented to it. Although much compliant behavior can be explained by the state’s adherence to the agreement, the norms of the treaty have to be understood and accepted in their application to concrete situations for them to have the power to induce obedience.

ABRAM CHAYES & ANTONIO HANDLER CHAYES, *THE NEW SOVEREIGNTY* 112 (1995).

46. The UDHR is a non-binding instrument to which the United States is a signatory. The fact that the UDHR also references a right to an adequate standard of living has no bearing on the discussion of any enforceable rights.

47. Federally funded Legal Services Corporation lawyers are generally banned from filing class action lawsuits on behalf of the poor, which means such work is generally done on a pro bono basis and, consequently, not much of it is done. If attorneys’ fees provisions were included in any implementing legislation following ratification of the ICESCR, the lack of legal representation would dissipate immediately. For an interesting analysis of how public interest litigation occurs in the United States today (to the extent that it does), see generally Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 605 (2009) (noting that “how public

rights that would, if ratified, establish a framework for decisions about what the poor in this country need in order to live meaningful lives.⁴⁸

The legal landscape would look decidedly different if, for example, every worker in the United States had an enforceable right to “just and [favorable] conditions of work,” including “[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”⁴⁹ If the United States ratified the Covenant, this guarantee, like all of the others included therein, would only need to be achieved “to the maximum of [the nation’s] available resources, with a view to achieving progressively the full realization of the rights recognized” by the Covenant.⁵⁰ The Covenant provides a right to earn “a decent living . . . [s]afe and healthy working conditions,” and a right to “[r]est, leisure, and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”⁵¹ These provisions alone would give advocates for the poor a foot in the door of the judicial system.⁵²

An enforceable right to just and favorable working conditions would be a new concept in the United States’ legal system, as would be “equal pay for equal work.”⁵³ The first public response would undoubtedly be

interest [litigation] is financed affects the kinds of cases that can be pursued and their likely social impact”). Profs. Rhode and Cummings describe the extent to which federally funded legal services attorneys have been hobbled since the 1980s, and the efforts of private attorneys to fill the gaps left by that hobbling through pro bono work, public interest law firms, and law school clinics. *Id.* at 619–20.

48. On the subject of adequate food, for example, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 204 (1999). “The contemporary age is not short of terrible and nasty happenings, but the persistence of extensive hunger in a world of unprecedented prosperity is surely one of the worst. . . . What makes this widespread hunger even more of a tragedy is the way we have come to accept and tolerate it as an integral part of the modern world, as if it is a tragedy that is essentially unpreventable (in the way ancient Greek tragedies were).” *Id.* This raises again the threshold question of this Article: Must the poor be always with us?

49. See International Covenant on Economic, Social and Cultural Rights, art. VII, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

50. See *id.* at art. II, ¶ 1.

51. *Id.* at art. VII. It is this provision that has earned ICESCR the derisive nickname of the “Holidays with Pay” treaty, but clearly there is more involved here than paid vacation time. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM J. INT’L L. 365, 368 (1990).

52. “[D]omestic litigation is the only alternative” to litigating in an international forum. Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 141 (2006).

53. *Id.* at 147. Without an Equal Rights Amendment, there is no reason to believe that, for example, men and women are currently being paid the same wage for the same

that the United States simply cannot afford to provide these rights (despite the fact that most developing nations have ratified the ICESCR and have thus undertaken to do just that).⁵⁴ There may be consensus that “it is difficult to complain about states’ budgetary priorities, given the difficulty for outsiders of evaluating the competing demands on the government.”⁵⁵ But the United States is not a “developing” state; it is still one of the wealthiest nations on earth. How we choose to allocate and spend that wealth may be the underlying issue, rather than whether we have enough of it.

As a human rights treaty, the ICESCR would be considered non-self-executing in the United States, meaning that implementing or enabling legislation would be required at the federal level before the rights contained in the Convention could be domestically enforced.⁵⁶ It could be expected to take years, or even generations, before any such legislation could be passed, but if the United States were to ratify the ICESCR, this

work in the United States, and studies consistently show that women continue to earn less than men for the same work. See *Women Deserve Equal Pay*, NAT’L ORG. FOR WOMEN (NOW), <http://www.now.org/issues/economic/factsheet.html> (last visited Dec. 18, 2010). The National Organization for Women (NOW) has found:

For full-time, year-round workers, women are paid on average only 78 percent of what men are paid; for women of color, the gap is significantly wider. These wage gaps stubbornly remain despite the passage of the Equal Pay Act in 1963, and a variety of legislation prohibiting employment discrimination. Women still are not receiving equal pay for equal work, let alone equal pay for work of equal value.

Id. Even acknowledging the possible bias of the cited source, there is no reason to doubt the veracity of its statistics.

54. As mentioned in Part I of this Article, the United States is one of only seven U.N. member states that have not yet ratified the ICESCR. International Covenant on Economic, Social and Cultural Rights, Declarations and Reservations, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

55. Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1772 (2008) (citing VARUN GAURI, SOCIAL RIGHTS AND ECONOMICS: CLAIMS TO HEALTH CARE AND EDUCATION IN DEVELOPING COUNTRIES, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 65, 66–67 (Phillip Alston & Mary Robinson eds., 2008) (1996)). Prof. Posner views this difficulty as one of the flaws of the human rights treaty regime, which he describes as “manag[ing] to sail both into the Scylla of excessive strictness and the Charybdis of excessive vagueness.” *Id.* at 1773.

56. See *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008); see also Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 154 (2006). “Because the Senate has included a non-self-executing clause to almost every significant international human rights instrument, this judicially created notion of non-self-executing treaties is the biggest obstacle facing the implementation of [International Human Rights Law] in U.S. courts.” Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 154 (2006).

is the path that must be followed.⁵⁷ In at least one other context, the Convention on the Elimination of All Forms of Discrimination Against Women, the United States has maintained it is not required to join an international covenant that would guarantee a right to equal pay for equal work because our laws already guarantee non-discrimination.⁵⁸ Resistance to implementing legislation on similar grounds would undoubtedly follow ratification of the ICESCR, but it might not be insurmountable because the Covenant itself specifies that “legislative measures” are particularly to be used in the process of progressively implementing the treaty’s provisions.⁵⁹

Again, ratification of the ICESCR, followed by enactment of implementing legislation, would dramatically alter the current civil, political, economic, social, and cultural landscape in the United States. The workers in this country would have domestically enforceable rights to decent wages, equal pay, paid vacations and paid holidays.⁶⁰ Anyone who thinks that American law already provides for all of these rights is simply uninformed.⁶¹ But in an ICESCR-compliant version of the United States, all workers would earn enough to provide a “decent living for themselves

57. Article 2, paragraph 1 of the ICESCR specifically states that a party to the Covenant must work toward “achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” International Covenant on Economic, Social and Cultural Rights, art. II, ¶ 1, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

58. See, for example, the United States’ proposed reservations to the Convention on the Elimination of All Forms of Discrimination Against Women at *Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the S. Comm. On Foreign Relations*, 103d Cong. 5-15 (1994): “[T]he United States does not accept any obligation under this Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in U.S. practice.” In this Reservation, the United States explicitly rejects the need for a law that guarantees women will be treated (and paid) equally to men in the workplace. *Id.* Ironically, both opponents and proponents of ratification of CEDAW argue current United States law already provides the protections guaranteed in that Convention; ratification opponents thus argue the Convention is unnecessary in the United States, while proponents argue the United States may as well ratify CEDAW because doing so would impose no new requirements on the country. This irony is discussed further in my Article, *U.S. Ratification of CEDAW: From Bad to Worse?*, 28 L. & INEQUALITY 119, 147–51 (2010).

59. International Covenant on Economic, Social and Cultural Rights, art. II, ¶ 1, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

60. See *id.* at art. II.

61. Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 152 (2006). “Although there is some truth to the notion that the United States (U.S.) Constitution provides more guarantees than does international law, there are areas where it is not as protective. Consequently, instances of U.S. violations of international human rights law (IHL) continue to arise.” *Id.*

and their families.”⁶² The implementing legislation could easily take on the appearance of any of the existing civil rights laws that are a part of the United States’ legal system; there is precedent, for example, in the Civil Rights Act of 1964.⁶³ It would not be difficult if it were not so politically volatile.⁶⁴ Every person in the United States would have a justiciable claim to equal pay and to a decent standard of living, regardless of that worker’s age, race, sex, national origin, or religion.⁶⁵ This, clearly, would change the posture of the poor and their efforts to have basic human rights met in relation to the U.S. justice system.

With any form of ICESCR implementing legislation at their disposal, lawyers for the poor in the United States could begin to take the steps necessary to reduce the gap between the rich and the poor in this country. Just as some group rights are currently enforced via class action lawsuits, the ICESCR’s implementing legislation would provide the avenue by

62. International Covenant on Economic, Social and Cultural Rights, art. VII, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

63. See 42 U.S.C. § 1983 (2006). Litigation under the Civil Rights Act is brought in federal court against either the government or a private entity for violations of the civil rights law. See *id.*

64. “As recently as 1996, few Americans took socioeconomic rights seriously, causing U.S. Supreme Court Justice Ruth Bader Ginsburg to remark that any attempt to constitutionalize socioeconomic rights would result in a defeat ‘far more stunning’ than the failed Equal Rights Amendment of the 1980s.” Taunya Lovell Banks, *A Few Random Thoughts About Socio-Economic Rights in the United States in Light of the 2008 Financial Meltdown*, 24 MD. J. INT’L. L. 169, 170 (2009) (quoting Peter Shinkle, *Justice Ginsburg: Constitution “Skimpy,”* THE ADVOCATE (Baton Rouge, La.), Oct. 25, 1996, 1B). Perhaps “politically volatile” is, therefore, an understatement.

65. While existing civil rights laws and constitutional provisions protect employees and job applicants from discrimination based on membership in a “protected class,” the current minimum wage laws fall short of providing income sufficient for a “decent standard of living.” For an interesting analysis of living wage versus minimum wage, see *Introduction to the Living Wage Calculator*, LIVING WAGE CALCULATOR, www.livingwage.geog.psu.edu (last visited Dec. 18, 2010). According to the statistics on this Pennsylvania State University web site, even a single worker with a full-time job and no dependants does not earn enough to support an adequate standard of living at the current minimum wage. The inadequacy of the minimum wage is exaggerated with the addition of each dependant to the worker’s household. This aspect of life for the working poor in the modern United States is discussed by BARBARA EHRENREICH, *THIS LAND IS THEIR LAND, REPORTS FROM A DIVIDED NATION* 35–37 (2008), concluding: “There is no moral justification for a minimum wage lower than a living wage. And given the experience of the twenty-nine states that have raised their minimum wages, there isn’t even an amoral economic justification either.” *Id.* Elsewhere in the same book, Ehrenreich asks, “How many ‘wake-up calls’ do we need, people—how many broken levees, drowned cities, depleted food pantries, and people dead for lack of ordinary health care? . . . The looting of America has gone on too long. The average American is too maxed out, overworked, and overspent to have anything left to take. The time has come for a new deal, a new distribution of power and wealth, if we want to restore the beautiful idea that was ‘America.’” *Id.* at 6–7.

which the right to a decent standard of living could be enforced through the courts. Remedies might include wage increases, paid holidays, and equal pay for equal work.⁶⁶ Injunctive relief might be appropriate because the damages caused by violation of these fundamental human rights cannot always be redressed by the payment of money.⁶⁷

The use of litigation to enforce human rights norms and/or to bring about social change is not without its drawbacks. At its best, “[l]itigation is a key strategy for protecting the rights and enlarging the power of subordinated groups, particularly when other channels of influence are unavailable. Groups hobbled by discrimination or collective action problems may turn to courts as allies in the struggle for social justice.”⁶⁸ However, there is some reason to believe that in the ongoing fight against poverty in the United States “litigation drained scarce movement resources, created confusion between ‘symbolic’ and ‘substantive’ victories, and co-opted potential movement leaders by paying them off with monetary awards.”⁶⁹ Some critics have complained that in previous domestic rights litigation, “[e]ven when litigants prevailed, the result was to legitimize a fundamentally unjust social and legal order.”⁷⁰ It is not at all clear whether litigation brought pursuant to any implementing legislation following the hypothetical ratification of ICESCR could, by itself, bring about meaningful social change. But it is possible that, “when deployed strategically, lawsuits can destabilize entrenched institutional structures and subject them to greater accountability.”⁷¹ Litigation as one tool for change should never be underestimated, but it should not be viewed as the only possible method of effecting change.⁷² A shift in culture is

66. Implementing legislation might include a private right of action, meaning that an individual could sue on his or her own behalf for violation of the rights addressed therein, just as is done in various civil rights laws at the state and federal levels.

67. If poverty is lack of opportunity rather than simply lack of money, as Prof. Sen suggests, money would probably not be an adequate remedy and injunctive relief might be the only appropriate relief.

68. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 606 (2009).

69. *Id.* at 608.

70. *Id.* (citing Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 *N.Y.U. REV. L. & SOC. CHANGE* 369, 372 (1983)).

71. *Id.* at 610 (citing Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015, 1062 (2004)). Profs. Cummings and Rhode note that “[e]ven lawsuits unsuccessful in the courts may generate public outrage that spurs political action.” *Id.* This describes a benefit of even unsuccessful litigation in relation to social movement.

72. Litigation should be “used . . . in tandem with other initiatives Objectives apart from winning can be critical, such as making a public record, raising awareness, or imposing sufficient costs and delays that will force defendants to adopt more socially re-

needed before the United States can accept the possibility that the poor need not necessarily be always with us.

B. *Economics, Law, and Poverty*

Poverty in the United States does not always look like poverty in other parts of the world. Many of the poorest residents of large cities in the United States live in federally subsidized housing, with electricity, clean running water, a solid roof over their heads, and even heating and air conditioning.⁷³ They have electric stoves on which to cook the food that is distributed by the government⁷⁴ or purchased with the help of food stamps. School children receive free or reduced price breakfasts and lunches. To some in the United States, this is a far cry from the face of poverty in developing countries;⁷⁵ around the world it is estimated that over a billion people do not have access to clean water and adequate sanitation.⁷⁶ The globally relative affluence of America's poor may prompt critics to argue the ICESCR is unnecessary in our nation.

Professor Amartya Sen has articulated the response to this argument. Poverty, according to Professor Sen, is about more than a lack of money:

sponsible practices." *Id.* at 611–12. These objectives seem to reflect some of the components of a culture change.

73. See RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL* 25 (2009). "[S]urveys of the 12.6% of Americans living below the federal poverty line (an absolute income level rather than a relative standard such as half the average income) show that 80% of them have air conditioning, almost 75% own at least one car or truck and around 33% have a computer, a dishwasher or a second car." *Id.*

74. The federal government provides some food items at low or no cost to the very poor via the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). See *About WIC*, FOOD & NUTRITION SERV., <http://www.fns.usda.gov/wic/aboutwic> (last updated Mar. 24, 2010) (explaining the purpose of WIC). According to its website, WIC is designed "to safeguard the health of low income women, infants, [and] children up to age 5 who are at nutritional risk by providing nutritious foods to supplement diets, information on healthy eating, and referrals to health care." *Id.* The limited amount of actual food that gets distributed is apparent from the website's language.

75. The United Nations recently raised the international definition of extreme poverty to include those persons who live on less than \$1.25 (US) per day. U.N. DEP'T OF ECON. & SOC. AFFAIRS, *RETHINKING POVERTY: REPORT ON THE WORLD SITUATION 2010 1* (2009), <http://www.un.org/esa/socdev/rwss/docs/2010/fullreport.pdf>.

76. According to UNICEF:

Almost fifty [percent] of the developing world's population—2.5 billion people—lack improved sanitation facilities, and over 884 million people still use unsafe drinking water sources. Inadequate access to safe water and sanitation services, coupled with poor hygiene practices, kills and sickens thousands of children every day, and leads to impoverishment and diminished opportunities for thousands more.

Water, Sanitation and Hygiene, UNICEF, <http://www.unicef.org/wash/> (last updated July 6, 2010).

poverty is a lack of capabilities.⁷⁷ “The role of income and wealth—important as it is along with other influences—has to be integrated into a broader and fuller picture of success and deprivation.”⁷⁸ A minimum wage worker, let alone a homeless person, in the United States is thus poor, just as is a person living on the streets of Port-au-Prince, Haiti, or a person in sub-Saharan Africa who does not have access to clean water and survives on less than one U.S. dollar per day. Professor Sen points out that

Even in terms of the connection between morality and income . . . it is remarkable that the extent of deprivation for particular groups in very rich countries can be comparable to that in the so-called third world. For example, in the United States, African Americans as a group have no higher—indeed have a lower—chance of reaching advanced ages than do people born in the immensely poorer economies of China or the Indian state of Kerala (or in Sri Lanka, Jamaica, or Costa Rica).⁷⁹

Thus, if poverty is viewed as a lack of capabilities or opportunities for development, it follows that the relative wealth of a nation is not indicative of the capabilities of its citizens if there is a large gap between the rich and the poor in that country, and that poverty in the United States is still poverty even if it has a superficial appearance of affluence when compared to developing nations.⁸⁰ To be poor in the United States is still to be poor, even if it does include electricity, running water, and a free school lunch.

The persistence of poverty in the United States might be attributed to the erroneous belief that, indeed, we will always have the poor among us, in the literal rather than the metaphorical sense. From the legal perspective, there seems to be a widespread doubt in this country about whether

77. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3 (1999). “Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.” *Id.* It is significant that this Nobel Prize-winning economist views poverty as being about more than inadequate income, and it ought to be an acceptable notion to those of us who have not been schooled to view the world through the lens of economics. *Id.*

78. *Id.* at 20. “Indeed, precisely because income deprivations and the capability deprivations often have considerable correlational linkages, it is important to avoid being mesmerized into thinking that taking note of the former would somehow tell us enough about the latter. The connections are not that tight . . .” *Id.*

79. *Id.* at 21 (citing his own earlier works: Amartya Sen, *The Economics of Life and Death*, *SCIENTIFIC AMERICAN*, April 1993, at 266; Amartya Sen, *Demography and Welfare Economics*, 22 *EMPIRICA* (1995)).

80. See generally RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL* 25 (2009).

there really is such a thing as economic, social, or cultural rights.⁸¹ That attitude does not seem to have changed in the twenty years since it was noted that “ratification of the Covenant by the United States would entail the acceptance of certain obligations, and that it is by no means certain that in the current political, ideological and economic climate, those obligations will be acceptable if they are subjected to the scrutiny they deserve.”⁸² That climate seems to persist today, and the United States is no closer than it was twenty years ago to accepting that its citizens might, or should, have “rights to food, clothing and housing, the right of access to physical and mental health care, and the right to education.”⁸³

Aside from the existence of instruments of international law, the fundamental notion of ethical behavior provides yet another reason to believe that freedom from poverty is a basic human right. Professor Sen’s capability approach “does not require or entail linkages with the actual system of international human rights law. Indeed, Sen’s work in ethics has emphasized the important role of the idea of human rights outside the legal domain, and suggests that the justification and elucidation of this idea is not contingent on the degree of precision necessary for codification and judicial enforcement.”⁸⁴ In this context, the international human rights instruments

81. There is “an absence of clear agreement on values between the United States and the international community when it comes to the very concept of economic, social and cultural rights.” Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM J. INT’L L. 365, 367 (1990). Prof. Alston notes two primary obstacles to ratification of ICESCR: the substantial nature of the obligations that the Covenant requires, and the “lack of consensus within the United States as to the desirability, or philosophical and political acceptability, of the domestic recognition of economic, social and cultural rights.” *Id.* at 368. As a “starting point,” Prof. Alston suggests that advocates for U.S. ratification of the ICESCR must acknowledge and address the reality that many U.S. citizens view the Covenant’s acronym as synonymous with a “Covenant on Uneconomic, Socialist, and Collective Rights,” fostering the nation’s apparently endless fear of anything that reeks of socialism. *Id.* at 366.

82. *See id.* at 368.

83. *See id.* at 369. Prof. Alston noted that the ICESCR is sometimes derisively referred to as the

“holidays with pay treaty” . . . [because] some of its most persistent detractors have long singled out that particular provision as indicative of the utopian and highly demanding nature of all of the rights recognized in the Covenant. While it is tempting to be diverted into a debate on that issue, it must suffice in this context to note that although the right to take an occasional break from work (a sabbath, in religious terms) is an important one, it is perhaps less self-evidently fundamental than several of the other rights dealt with.

Id. at 368–69 (footnote omitted).

84. POLLY VIZARD, POVERTY AND HUMAN RIGHTS: SEN’S ‘CAPABILITY PERSPECTIVE’ EXPLORED 140 (2006). In addition to his work in ethics, Prof. Sen’s economic approach to poverty “highlights the important role of different complementary institutions

reinforce and support the idea of the capability to achieve a standard of living adequate for survival and development—including adequate nutrition, safe water and sanitation, shelter and housing, access to basic health and social services, and education—as a basic human right that governments have individual and collective obligations to respect, protect, and promote.⁸⁵

When seen in this light, human rights must be recognized as implicating not just law, but economics, ethics, and culture, as well.

Even if it were possible for existing U.S. laws to be somehow interpreted as providing the same levels of protection that the Covenant would guarantee (and if that were possible, it is unclear why poverty would persist in this country), there is still the matter of international accountability. By ratifying the ICESCR, the United States would open itself up to scrutiny by the international community via the Committee on Economic, Social and Cultural Rights, which is the U.N. body that monitors member state compliance with the ICESCR.⁸⁶ Accountability is one of the goals of the Covenant, while simultaneously being one of the most objectionable aspects from the United States' perspective: concerns about infringement on sovereignty are often cited in connection with the United States' reluctance to commit to international human rights instruments,⁸⁷ yet some departure from the strictest sense of sovereignty is necessary in order for international law to function at all.⁸⁸

(economic, political, legal, etc.) in avoiding 'capability deprivation' and achieving 'capability expansion.'" *Id.*

85. *Id.* at 141.

86. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM J. INT'L L. 365, 370 (1990). "The question of full U.S. compliance would still ultimately be subject to (albeit advisory and thus unenforceable) determination by the Committee." *Id.* at 371. This committee oversight is found in other human rights treaties as well, such as CEDAW, which the United States has similarly declined to ratify despite the fact that there is no indication that the Committee will use its position to impose its views on the member states it monitors. However, the presence of a monitoring committee may have different effects when combined with the ICESCR's "progressive implementation" provision: the Committee's presence might enable the United States to remain engaged in an ongoing discussion of equality even after the treaty is ratified and implemented. This would avoid the potential for a hollow ratification, discussed in my earlier article, *U.S. Ratification of CEDAW: From Bad to Worse?*, 28 L. & INEQ. 119, 159 (2010).

87. NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 108–09 (1990).

88. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM J. INT'L L. 365, 371 (1990), regarding the foreign policy considerations as an obstacle to U.S. ratification of ICESCR. Such considerations resurrect the notion that economic, social and cultural rights belong in the "private" sphere while political and civil rights belong in the "public" sphere, and

In keeping with Professor Sen's capability approach to poverty, Professor Martha Nussbaum refers to "liberty, along with bodily integrity and nutrition and health care, [as] among the goods that must be distributed in a way that shows equal respect for persons."⁸⁹ Clearly, poverty is about more than money; it is about liberty, choice, capability, and opportunity. The ICESCR explicitly requires that states parties treat everyone as being of equal worth and deserving of equal respect. Whether implementing legislation is capable of creating a justiciable right to equal respect is the question that would confront the United States in the event of ratification. Legislation and subsequent litigation alone probably cannot bring about the type of change that would be needed for this to happen.

If nothing else, however, procuring an enforceable right to a decent standard of living for every worker in the United States could signal the end of poverty as we now know it. We ought to consider the possibility that poverty is not a necessary thread in the fabric of our society. We need not always have the poor with us. We have sufficient resources which, if distributed more equitably, could not just reduce but eradicate poverty.⁹⁰

IV. WHY ICESCR, AND WHY NOW

A. *Internalization of International Norms*

More literature has been devoted to the potential benefits of utilizing the ICESCR's provisions in developing nations,⁹¹ than has been written

thereby perpetuate the perception that economic, social and cultural rights are not enforceable and may not even be rights at all. *Id.* at 373.

89. Martha C. Nussbaum, *Robin West, Jurisprudence and Gender: Defending a Radical Liberalism*, 75 U. CHI. L. REV. 985, 994 (2008) (defining liberalism as an approach requiring all human beings be treated as having equal worth and deserving of equal respect).

90. *See generally* JACQUELINE NOVOGRATZ, *THE BLUE SWEATER* 245 (2009) (discussing "patient capital" as a concept combining philanthropy and market forces to create sustainable methods of reducing poverty and its accompanying social, political, and public health problems). Interestingly, Ms. Novogratz addresses distribution of safe water in developing nations in India and Africa:

I have been invited numerous times to sit on panels focused on determining whether water is a human right or its ownership is privatized. . . . [T]he question is wrong. People need water to live, and there is no better intervention to improve health on a global scale than bringing safe, affordable water to as many people as possible. But how do we make sure it can be distributed to the poor in a sustainable way? How do we ensure that all people have access at least to the minimum amount of water needed to live healthy lives?

Id. at 264-65. The questions of distribution ought to take precedence over any questions of "rights."

91. *See, e.g.,* Yong-Shik Lee, *Theoretical Basis and Regulatory Framework for Micro-trade: Combining Volunteerism with International Trade towards Poverty Elimination*, 2 L.

about why the Convention is needed in the United States. Perhaps it is time for the United States to acknowledge that the poor among us are just as in need of the ICESCR's protections as are the poor in other parts of the world, in what we refer to as developing, or even "lesser developed," countries.⁹² If, in forty years of waging a war on poverty, we as a nation have proven ourselves incapable of reducing (let alone eradicating) poverty, it may well be time to acknowledge the need to internalize international standards that will, over time, become a part of our national culture. Law for law's sake is not generally beneficial,⁹³ but this may be a rare instance in which a law that is not susceptible to immediate enforcement has a purpose: to bring about the internalization of the international norms embodied in the ICESCR.⁹⁴

On the question of whether international law changes the way nations behave, it has been said that the law's purpose is not to keep people from doing what they would like to do, but is instead to codify the way people are already inclined to act.⁹⁵ "Much of law, and the most successful part, is a codification of existing mores, of how people behave and feel they ought to behave. To that extent law reflects, rather than imposes, existing order."⁹⁶ To the extent this is true, the United States appears to be as yet unready to adopt the international law that could alleviate or eliminate

& DEV. REV., no. 1, at 367, 367–71, 394–95 (2009), available at <http://www.bepress.com/ldr/vol2/iss1/art12/> (describing microtrade as a way of enabling developing countries to reduce their poverty levels).

92. Regarding the rhetoric of dichotomies such as "developing" as opposed to "developed" nations, see Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 267–68 (2004). "These dichotomies allude to specific social circumstances in which the exercise of power determines outcomes. This understanding provides a useful perspective from which to examine current human rights models. Many authors have experienced difficulty with dichotomizing terminology." *Id.* at 266 n.27. "Use of such terminology may suggest the need for redistribution of power and resources as well as 'a fundamental rethinking of international relations.'" *Id.* (citing Karen Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Disclosure*, 16 WIS. INT'L L.J. 353, 360 (1998)).

93. This is borne out by Prof. Hathaway's research on whether human rights treaties make a difference in the way states parties behave. See Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1950 (2002).

94. The fact that a right may not yet be enforceable is not fatal to its validity. "[T]he ethical force of human rights is made more powerful in practice through giving it a high-profile social recognition and an acknowledged status, even when no enforcement is instituted." Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2919 (2006).

95. LOUIS HENKIN, COUNCIL ON FOREIGN RELATIONS, *HOW NATIONS BEHAVE* 93 (2d ed. 1979).

96. *Id.* "To say that nations act pursuant to law only as they would act anyhow may indicate not that the law is irrelevant, but rather that it is sound and viable, reflecting the true interests and attitudes of nations, and that it is likely to be maintained." *Id.*

poverty in this country. If, however, behavior is shaped by law rather than vice versa, then it is clearly time for the United States to ratify the ICESCR and begin to address poverty as a human rights violation in this country.⁹⁷ It may not matter which comes first, ratification or internalization, when the ultimate goal is of such critical importance to so many citizens of this nation.⁹⁸

Twenty years ago the impact of international law on the economic well-being of states and their citizens seemed promising. "By new international arrangements and agreements based on 'welfare principles' rather than on free-market forces, the majority hopes to satisfy basic human needs for their people, narrow the gulf between rich and poor states, accelerate economic development for all, bring the fruits of science and technology everywhere."⁹⁹ The promises made in the middle of the twentieth century may have come to some fruition concerning the relations between states, as, for example, health care and secondary education for girls became more readily available in many parts of the world that had not previously valued or even allowed such things. But how nations treat their citizens has remained a largely internal matter in deference to states' "sovereignty."¹⁰⁰ Human rights laws in general, and ICESCR in particular, have sought to change that. How the United States treats its citizens who live in poverty remains unaffected by international law perhaps at least in part because the most essential human rights treaties have not been ratified here. Thus the promise of meeting the basic human needs of people, of narrowing the gulf between rich and poor, of accelerating economic development and access to science and

97. See *id.* at 98. "Law is one force—an important one among the forces that govern international relations at any time; the deficiencies of international society make law more dependent on other forces to render the advantages of observance high, the costs of violation prohibitive." *Id.*

98. This is distinguishable from potential U.S. ratification of other human rights treaties, such as CEDAW. See Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse?*, 28 *LAW & INEQ.* 119, 152-54 (2010) (discussing the risk of legal co-optation if the Women's Convention were ratified without any true national commitment to its goals). There is no real "poverty movement" in the United States today, so there is no danger of co-optation of the movement by ratifying treaties and passing implementing legislation that might be unenforceable. There is no organization the resources of which might be misspent by pushing for legislation. Poor people in the United States have no lobbyists, and most of them do not vote. They are largely invisible and absent from the political process. They have nothing to lose and everything to gain by having some rights formally recognized.

99. LOUIS HENKIN, *COUNCIL ON FOREIGN RELATIONS, HOW NATIONS BEHAVE* 199 (2d ed. 1979).

100. As Prof. Henkin noted, "i.e., not any one else's business and therefore not any business for international law." *Id.* at 228.

technology¹⁰¹—all of these remain beyond the reach of many U.S. citizens.

B. *Law, Morality, and Culture*

Questions of morality are unavoidable when discussing the basic human needs for food, water, and shelter, perhaps particularly so in a nation such as the United States, with abundant resources.¹⁰² Florence Wagman Roisman has equated poverty lawyers with abolitionists in this country:¹⁰³ “Just as the ‘powerless and marginal handful’ of abolitionists witnessed the immediate, unconditional end of slavery, and the quixotic, idealistic reformers of the twentieth century saw the end of de jure segregation, so should success come to those who will battle now not simply to ameliorate but to eliminate homelessness and poverty in the United States.”¹⁰⁴ Five years after the idea of lawyers as abolitionists was proposed, Professor Susan Jones added that the “[a]ppropriate public subsidies in housing, full employment at a living wage, as well as income generation and asset accumulation strategies have the potential to bring us closer to the goal of abolishing poverty. Achieving this goal is possible with moral and political will.”¹⁰⁵ Authors such as Professors Roisman and Jones invoke the memory of Dr. Martin Luther King, Jr., who wrote that “the solution to poverty is to abolish it directly,” and advocated for a

101. *Id.* at 199. The point is that the goals Prof. Henkin described twenty years ago for international relations between sovereign states are just as relevant today to the relationship between citizens of the United States and their government.

102. The relationship of law, morality, ethics, and politics is discussed as far back as Aristotle’s *Nicomachean Ethics*. Prof. Ronald Dworkin has extensively analyzed the connection between rights and responsibilities in terms of law, politics, and ethics. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* 164 (1998). “Ordinary politics shares with utopian political theory certain political ideals, the ideals of a fair political structure, a just distribution of resources and opportunities, and an equitable process of enforcing the rules and regulations that establish these.” *Id.* It has recently been noted that “Dworkin is famous for propounding the notion of ‘taking rights seriously’ and of ‘rights as trumps,’ beginning in *Taking Rights Seriously* and continuing through *Justice for Hedgehogs*. On this view, constitutional rights, though not absolute, generally prevail over the majority’s conception of the common good or the general welfare.” James E. Fleming, *Taking Responsibilities As Well As Rights Seriously*, 90 B.U. L. REV. 839, 844 (2010). Prof. Fleming notes further that “Dworkin is at pains to insist upon the distinction between, on the one hand, government *encouraging responsibility* and on the other, government *coercing conformity* with the majority’s conception of the responsible decision: in short, the distinction between responsibility and coercion.” *Id.* at 845 (emphasis in original).

103. Florence Wagman Roisman, *The Lawyer as Abolitionist: Ending Homelessness and Poverty in Our Time*, 19 ST. LOUIS U. PUB. L. REV. 237, 238 (2000).

104. *Id.* at 239–40 (footnote omitted).

105. Susan R. Jones, *The Social Responsibility of Lawyers: Dr. Martin Luther King, Jr.’s Legacy: An Economic Justice Imperative*, 19 WASH. U.J.L. & POL’Y 39, 64 (2005) (calling the efforts to end poverty “a fundamentally moral crusade”).

“guaranteed income” that “‘would benefit all the poor,’ not only the African American poor.”¹⁰⁶

It is highly likely that law alone is not the solution to the ongoing question of why or whether we must always have the poor among us. Full exploration of the relationship between law and morality is the subject of much debate.¹⁰⁷ For the purposes of this Article, the relationship between morality and international human rights instruments is at issue. It seems clear from an examination of the last fifty years’ worth of literature, at least, that the United States has not made much progress in the fight against poverty by using strictly domestic legislation. If poverty can be viewed as a violation of global human rights norms, the only way to bring about change will be to bring about a change in the nation’s attitude toward poverty. Internalization of international norms of basic human rights is a necessary step in the process.¹⁰⁸

Culture as well as morality must be considered in addressing poverty in the United States. For many years, particularly the second half of the twentieth century, it was easy for many people in the United States to ignore poverty or to assume that it would never personally affect them.

106. *Id.* at 43 (citing Gary Chartier, *Civil Rights and Economic Democracy*, 40 WASHBURN L.J. 267, 281 (2001) (citing Martin Luther King, Jr., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 199-00 (1968))).

107. *See, e.g.*, Eric Posner, *The Jurisprudence of Greed*, 151 U. PA. L. REV. 1097, 1101-02 (2003).

Self-interest in law and economics is thus not empty, and yet it is a far cry from greed. Whereas greed either refers to excessive bodily appetites or an excessive longing for purchasing power, self-interest refers to a wider range of moderate desires, both bodily and abstract . . . [J]udges, like other people, hate greed, and they frequently justify their decisions against people by referring to their greed.

Id. at 1101.

108. As Prof. Sen noted, “For some rights, the ideal route may well not be legislation but something else, such as recognition or agitation, or even public discussion and education, with the hope to change the behavior of those who contribute to the violation of human rights.” Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2910. Prof. Sen defines the notions of recognition and agitation in terms that are analogous to the notion of internalizing the international norms. His point is that law alone is not enough:

The effectiveness of the claims of human rights does not rest on seeing them invariably as putative proposals for legislation. . . . [I]t is important to give the general ethical status of human rights its due, rather than locking up the concept of human rights prematurely within the narrow box of an entirely legal approach.

Id. at 2921. Others have defined “‘norms’ in a generic sense to include a broad class of generalized prescriptive statements—principles, standards, rules, and so on—both procedural and substantive.” *Id.* (footnote omitted). “The term includes statements that are reduced to writing or some other authoritative formulation as well as informal, tacit, or background norms.” ABRAM CHAYES & ANTONIO HANDLER CHAYES, *THE NEW SOVEREIGNTY* 113 (1995).

However, the financial crisis in the fall of 2008 may have made poverty more real to many United States citizens.¹⁰⁹ It is possible that this crisis will have a beneficial impact in the United States if it renews the conversation about poverty and basic human rights in this country.¹¹⁰ Engaging in a conversation about poverty at the national level may be the first step toward internalizing the dominant international norms that underlie the ICESCR and that recognize poverty as a violation of basic human rights. "Different cultures have different notions of dignity, but societal norms are not static. They are capable of changing, but not as a result of law or legal pronouncements alone."¹¹¹ As Professor Banks notes, "Without a strong public commitment to universalizing socioeconomic commitments and creating permanent, rather than short-term, safety nets, American socio-economic commitments will continue to fall short of the ICESCR's mandate."¹¹²

Such a public commitment to socioeconomic rights can perhaps best be achieved through "persuasive leadership and massive grassroots activism."¹¹³ On the subject of grassroots organizing, the role of culture cannot be under-estimated.¹¹⁴ Ratification of the ICESCR and subsequent enactment of enabling legislation, or even constitutionalizing the notion of socioeconomic rights, cannot bring about change for poor people in the United States unless the nation's culture evolves to the point where eliminating poverty becomes accepted as not only possible but as necessary.

This is where Professor Sen's concept of poverty as a lack of capabilities might be very useful to the United States. Only when we as a nation

109. Taunya Lovell Banks, *A Few Random Thoughts About Socio-Economic Rights in the United States in Light of the 2008 Financial Meltdown*, 24 MD. J. INT'L. L. 169, 171 (2009). Prof. Banks notes that, "Byproducts of the financial meltdown will be unemployment; loss of housing, healthcare, and adequate food; and increased numbers of families in crisis." *Id.*

110. *Id.* "The looming changes in the socio-economic fortunes of adult Americans and their children may increase discussions about socioeconomic commitments in the United States." *Id.*

111. *Id.* at 172 (proposing that in the United States' culture, the government's responsibility to provide for the basic human needs of its citizens exists only in the case of a natural disaster, such as hurricane Katrina).

112. *Id.* at 177.

113. *Id.*

114. See CASS SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009) for an in-depth analysis of the factors that come into play when groups mobilize around, or even accept, common principles. For example, Prof. Sunstein notes: "If like-minded people, predisposed to be outraged, are put together, significant changes are to be expected." *Id.* at 114. He also observes that "When people shift from indifference to intense concern with local problems, such as poverty and crime, group polarization is an achievement, not a problem." *Id.* at 149.

begin to accept the idea that poverty is about more than money might we begin to see our way out of thinking of it as a necessary part of our society. We have enough money, but we do not currently distribute it in any equitable manner.¹¹⁵ If we are not willing to share money, perhaps we could accept sharing opportunities. Thus, we might progress toward the notion that every human being ought to have the same capability for development. This is good for the individual, certainly, but also good, inevitably, for society.

Obviously, this requires a shift in the United States' culture to accept the possibility that poverty need not be an ever-present aspect of life in this country. This has been proposed on an international level by Professor Lan Cao who has written that "law is peripheral, not central, to the development problem of poor countries."¹¹⁶ In advocating an approach that would "pursue the objective of purposive culture change," Professor Cao has argued that "we must enter the cultural milieu and ask whether certain cultural attributes in a given society are an impediment to that society's economic development."¹¹⁷

Professor Cao is concerned with cultural norms that stand in the way of poor nations' abilities to develop economically.¹¹⁸ We in the United States should be concerned with cultural norms that stand in the way of our own citizens' abilities to develop themselves economically—to, in

115. The immediate reaction to this is likely to be that it is simply impossible to distribute anything equitably in our society. However,

[W]hy should complete feasibility be a condition of cogency of human rights when the objective is to work towards expanding both their feasibility and their actual realization? The understanding that some rights are not fully realized, and may not even be fully realizable under present circumstances, does not, in itself, entail anything like the conclusion that these are, therefore, not rights at all.

Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2910 (2006).

116. Lan Cao, *Culture Change*, 47 VA. J. INT'L L. 357, 367 (2007).

117. *Id.* at 358. Prof. Cao argues that "[l]aw may still be relevant, but only if it is *also* viewed culturally, and not just instrumentally, 'as the embodiment of norms . . . and the repository of social meanings.'" *Id.* (emphasis in original) (citing Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 973-74 (2005)); see also Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 584 (2009) ("[W]e should understand the contemporary turn to culture as a tool of governance—as an effort to implement the rule of law through the self-ordering of individual people, and as the idea that through culture interveners can make law and development internal and can regulate individuals from the inside).

118. Lan Cao, *Culture Change*, 47 VA. J. INT'L L. 357, 358 (2007). "If law embodies or reflects norms, then norms must accordingly be addressed, especially those that may be at odds with development themes." *Id.*

Professor Sen's words, find Freedom as Development.¹¹⁹ Writing over ten years ago, Professor Sen noted that the United States' culture tolerates the lack of affordable health care for the poor.¹²⁰ This is a circumstance that would be unacceptable in, for example, Europe, where basic health care is considered a right rather than a privilege.¹²¹

One indicator of culture's role in the continued existence and growth of poverty in the United States is the ever-growing gap between the rich and the poor in this country. It can no longer be doubted that as the rich grow richer here, the poor grow poorer. As Professor Sen has noted, "[t]he real problem here is not the need for financial conservatism in itself, but the underlying—and often unargued—belief that has been dominant in some policy circles that human development is really a kind of luxury that only richer countries can afford."¹²² It is in everyone's best interests to work toward the elimination of poverty, and perhaps if the United States saw the economic benefits in reducing the gap between the rich and the poor, this goal would be more palatable. "There is every evidence that even with relatively low income, a country that guarantees health care and education to all can actually achieve remarkable results in terms of the length and the quality of life of the entire population."¹²³ The government of a country with adequate resources that declines the opportunity to use those resources to lessen the gap between rich and poor does its citizens, both rich and poor, a disservice.

"The problems in rich countries are not caused by the society not being rich enough (or even by being too rich) but by the scale of material differences between people within each society being too big. What matters is where we stand in relation to others in our own society."¹²⁴ There is

119. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3 (1999). Nothing in the current United States health care "reform" system is likely to change this fact because the reform impacts only those who have private health insurance, which most poor people in the United States do not.

120. *Id.* at 98. "[T]he bulk of the uninsured do, in fact, lack the ability to have medical insurance because of economic circumstances, and in some cases because of preexisting medical conditions that private insurers shun." *Id.*

121. *Id.* "The limits on governmental support for the ill and poor are too severe in the United States to be at all acceptable in Europe, and so are the social commitments toward public facilities varying from health care to educational arrangements, which the European welfare state takes for granted." *Id.*

122. *Id.* at 143. "Human development is first and foremost an ally of the poor, rather than of the rich and the affluent." *Id.* at 144.

123. *Id.* at 144. Prof. Sen noted in 1999 that "Financial conservatism should be the nightmare of the militarist, not the school teacher or the hospital nurse" because "what really should be threatened by financial conservatism is the use of public resources for purposes where the social benefits are very far from clear, such as the massive expenditures that now go into the military." *Id.* at 145.

124. RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL* 25 (2009).

statistical data to the effect that absolute wealth or poverty is much less important than relative wealth or poverty when it comes to such concrete measures of well-being as mortality rates, adequate housing, and educational opportunities.¹²⁵ The bigger the gap between the rich and the poor, the more health and social problems a nation has, whether that country is one that is considered a wealthy country or a poor one.¹²⁶ “The view that social problems are caused by poor *material* conditions . . . implies that richer developed societies would do better than the others. But this is a long way from the truth: some of the richest countries do worst.”¹²⁷ Income inequality is bad for everyone because even the wealthy end up paying, via taxes if nothing else, for the problems of the less wealthy.¹²⁸

“[G]reater equality, as well as improving the wellbeing of the whole population, is . . . the key to national standards of achievement and how countries perform in lots of different fields.”¹²⁹ A high rate of income inequality, such as is represented by the ever-widening gap between the rich and poor in the United States, thus lowers the nation’s achievement rates and the quality of life for all of us. Therefore, even the relatively

125. *See id.*

126. *Id.*

127. *Id.* It is again worth noting that the authors of this international study note that:

[S]urveys of the 12.6% of Americans living below the federal poverty line (an absolute income level rather than a relative standard such as half the average income) show that 80% of them have air conditioning, almost 75% own at least one car or truck and around 33% have a computer, a dishwasher or a second car. *What this means is that when people lack money for essentials such as food, it is usually a reflection of the strength of their desire to live up to prevailing standards . . . As Adam Smith emphasized, it is important to be able to present oneself creditably in society without the shame and stigma of apparent poverty.*

Id. (emphasis added).

128. Barbara Ehrenreich might beg to differ. *See* BARBARA EHRENREICH, *THIS LAND IS THEIR LAND, REPORTS FROM A DIVIDED NATION* 45–47 (2008). She points out in a chapter entitled “Could You Afford to be Poor?” that it may actually be the poor who pay for the rich in the United States rather than the other way around:

So let’s have a little less talk about how the poor should learn to manage their money, and a little more attention to all the ways that money is being systematically siphoned off. Yes, certain kinds of advice would be helpful: skip the payday loans and the rent-to-[buy] furniture, for example. But we need laws in more states to stop predatory practices like \$50 charges for check cashing. Also, think what some microcredit could do to move families from motels and shelters to apartments. And did I mention a living wage? If you’re rich, you might want to stay that way. It’s a whole lot cheaper than being poor.

Id. at 43–44.

129. RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL* 29 (2009). “The evidence shows that reducing inequality is the best way of improving the quality of the social environment, and so the real quality of life, for all of us.” *Id.*

wealthy in this country ought to recognize that it is in their own self interests to reduce the gap between the rich and the poor. Ratification of the ICESCR, and implementation of its guarantees of an adequate wage and standard of living, plus health care and educational opportunities, would go a long way toward reducing that gap. No one in this country can afford to ignore the negative ramifications of accepting as inevitable that the poor will be always with us.

C. *Progressive Realization of Human Rights Goals*

The unique feature of the ICESCR is its provision for progressive implementation, which provides that each state party shall “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”¹³⁰ At first glance this provision might appear to frustrate the goal of eradicating poverty, because it is facially indefinite in its requirements, but upon further examination it is this progressive implementation provision that could, and should, make the ICESCR effective in the United States.

Eradicating economic, social, or cultural injustices by way of law, morality, or internalization of international norms has generally been most likely to happen in the United States via social movement.¹³¹ Unfortunately, history shows that many social movements fail in this country as a result of legal or extra-legal co-optation. Both the civil rights and the labor movements have been viewed as “failed successes” for having come to a halt in the face of legislation and/or judicial action that appeared to

130. International Covenant on Economic, Social and Cultural Rights, art. II, ¶ 1, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3. This progressive implementation is measured based on reports made by member states to the Committee. Other human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women, rely solely on reports to assess a state party's compliance with the treaty. The ICESCR is unique in providing for progressive implementation in addition to periodic monitoring by a committee. It is the progressive implementation that keeps the national and international conversation about inequality an ongoing one rather than a dead-ended one.

131. If law alone were the answer, poverty should have already been eradicated. If morality alone were the answer, the United States would probably need to have one common religion, which it does not and cannot. If international norms had been internalized, the United States would already be a party to, and in compliance with, ICESCR. Because neither law, morality, nor international norms appear to be accomplishing the goal of eradicating poverty, social movement might be the next possible route to eradication of poverty. See, e.g., Amy Wax, *Public Change, Or Judicial Decree? The Courts, The Public, And Welfare Reform*, 32 HARV. J. L. & PUB. POL'Y 45, 46 (2009) (“All told, there is little reason to believe that courts will significantly shape the law and policy of poor relief in the near future.”).

benefit their underlying causes.¹³² As described by Professor Orly Lobel, the problem is a result of the dynamics that occur when a group that has been engaged in some sort of social reform becomes the beneficiary of the existing social system: "As they engage with the law, social reform groups become absorbed by the system even as they struggle against it."¹³³ This effect can be seen, for example, in the fact that the Civil Rights movement made little de facto progress after enactment of the Civil Rights Act of 1964, and that the labor movement in the United States never regained the momentum it had previously achieved subsequent to passage of the National Labor Relations Act.¹³⁴

Co-optation can deradicalize social reform movements.¹³⁵ It can cause groups to splinter and thus to lose their central point of focus. But in order to suffer the ill effects of co-optation, the group members must first enjoy solidarity; if there is no common focus, there is no danger of co-optation. Consequently, a large, loosely related group of individuals without a common identity cannot be deradicalized or un-focused by the effects of co-optation.¹³⁶ The poor in the United States do not appear to

132. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 940 (2007).

133. *Id.* at 939. Regarding both legal and extralegal co-optation, see FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1979).

134. Labor unions represent less than 13 % of United States' workers today, by some estimates. In January of 2009, the Washington Post and the New York Times both announced a jump in union membership from 12.1 to 12.4%. The percentage of American workers who belong to a union has been in decline since the 1950s. Peter Whoriskey, *American Union Ranks Grow After 'Bottoming Out'*, WASH. POST, Jan. 29, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/01/28/AR2009012801621.html> (speculating that the percentage increase might have been attributable to the loss of non-union jobs during the economic downturn that began in the Fall of 2008); Steven Greenhouse, *Union Membership Up Sharply in 2008, Report Says*, N.Y. TIMES, Jan. 28, 2009, available at <http://www.nytimes.com/2009/01/29/us/29labor.html>. The National Labor Relations Act was passed in 1935. As noted by Prof. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 942 (2007), "In both periods [the Civil Rights Movements and the Labor Movement], critics have understood victories as limited and symbolic, deradicalizing and coopting a more comprehensive vision." Prof. Lobel refers to these social movements as "failed successes" because they resulted in legal reform but not social reform. *Id.* at 940.

135. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 (2007). Prof. Lobel defines legal co-optation as "a process by which the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from ore effective and transformative alternatives." *Id.*

136. Identity politics, then, play a large role in the notion of co-optation. A group without a shared identity has no identity to lose. If there is no common focus or sense of solidarity, there is no risk of those things being lost.

share the common bonds that might make the risk of co-optation a valid concern.

In other contexts, there is a risk that ratification of human rights treaties might put an end to any international conversation about whether a state is violating basic principles of human rights.¹³⁷ In the case of the ICESCR, however, there is genuinely nothing to lose and everything to gain by the United States' ratification. There is no group or social movement whose goals or purposes might be co-opted by ratification because poverty in the United States crosses all lines of race, age, gender, ethnicity, religion, and national origin. The poor in this country are all races, all religions, both sexes, all ages, and every ethnicity. There are urban poor and rural poor, well-educated poor and under-educated poor, working poor and unemployed poor. Men, women, and children from every corner of this country and every walk of life experience the devastating effects of poverty either long-term or temporarily. In this country, poverty is defined by a line on the income chart; that is the only shared characteristic of the millions in the United States who are characterized as the poor. With only one common thread, and that thread being the fluctuating figure of gross annual income, the poor in the United States lack any cohesive characteristics that might make them a social reform group whose movement could be at risk of either legal or extra-legal co-optation. The poor, and thus the rest of us as well, have nothing to lose and everything to gain by ratification of the ICESCR.

From its inception, grassroots organizing was a prime player in the "War on Poverty" in the United States. "Historically, organizing has served as a tool to politicize and mobilize people who lacked access to established and traditional forms of political and economic power."¹³⁸ Such organizing has always involved some common traits or characteristics, even if that simply meant shared geographical neighborhoods.¹³⁹

137. This topic has been extensively addressed by Prof. Oona Hathaway. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1941 (2002). Prof. Hathaway's research concluded that in some cases, nations' human rights performances fall rather than rise subsequent to ratification of human rights instruments.

138. Julissa Reynoso, *The Impact of Identity Politics and Public Sector Reform on Organizing and The Practice of Democracy*, 37 COLUM. HUM. RTS. L. REV. 149, 150 (2005).

139. *Id.* "The goal of organizing is to connect individuals to one another, often based on the shared experiences of geographic neighborhoods, so that, collectively, they could respond to their immediate needs, gain power, and demand and instigate change." Ms. Reynoso cites Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 4-5 (2001), which will add depth and insight to any discussion of law and social movements. See also the works of Saul Alinsky, including his books *REVEILLE FOR RADICALS* and *RULES FOR RADICALS*. Mr. Alinsky advocated not just social reform but revolution, and on page 7 of *RULES FOR RADICALS* he

The poor in the United States lack any such connection that might spur them toward collective social movement. The move away from Public Housing Authority projects to Section 8 housing assistance removed even geography as a common thread for many of the urban poor in the United States.¹⁴⁰ It is difficult to mobilize a group that has no shared characteristics (other than income level) and no shared geography. While it certainly prevents them from organizing for collective action, it is this lack of identity that protects the poor from being co-opted by the status quo in the United States.

This same lack of identity that insulates the poor from the negative effects of co-optation also reveals the need for the United States to ratify the ICESCR. With its built-in progressive implementation mechanism, the ICESCR is uniquely suited to addressing the far-reaching and widespread problems of poverty in this country. Under existing law, the poor have no right to food, water, or shelter;¹⁴¹ no right to an adequate standard of living; no right to health care or insurance; and no right to improve their current lot in life.¹⁴² Under the ICESCR, each of those essential needs is considered a basic human right and, with appropriate implementing legislation, could be enforceable in the United States. With ratification, the poor have rights; without it, they do not. There is no good reason for failing to ratify the ICESCR, and many good reasons to ratify it.

quoted Abraham Lincoln's first inaugural address: "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it." Significantly, "[r]acism, sexism, and other forms of identity-based oppressions, however, were not a basis of Alinsky's organizing strategy . . . [A]n individual's status in society based on her gender, race, or ethnicity was often seen as peripheral." Julissa Reynoso, *The Impact of Identity Politics and Public Sector Reform on Organizing and the Practice of Democracy*, 37 COLUM. HUM. RTS. L. REV. 149, 155 (2005).

140. See CASS R. SUNSTEIN, *GOING TO EXTREMES, HOW LIKE MINDS UNITE AND DIVIDE* (2009).

141. Regarding a right to housing, see Kristen David Adams, *Do We Need A Right To Housing?*, 9 NEV. L.J. 275, 291 (2009). Prof. Adams makes the point that we do, in fact, need a right (as opposed to some other goal) to housing. *Id.* at 320. Furthermore, on July 29, 2010, the United States (along with 40 other countries) abstained from participation in a vote by the U.N. General Assembly that declared "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights." Resolution A/64/L.63/Rev.1.

142. Welfare benefits vary widely from state to state. See Amy L. Wax, *Norm Change or Judicial Reform? The Courts, the Public, and Welfare Reform*, 32 HARV. J.L. & PUB. POL'Y. 45, 49 (2009) (welfare reform in the 1990s "significantly expanded states' discretion in doling out benefits, allowing greater ambit for innovative programs, conditions, and restrictions.").

The United States has been criticized for its reluctance to ratify human rights treaties:

Unlike some governments, who choose to ratify many human rights treaties without intending to give them full compliance, the United States ratifies remarkably few, and with so many reservations, understandings and declarations that it conveys the misimpression that it does so with the general intent of noncompliance. This creates the global impression, as Professor Louis Henkin likes to say, that in the cathedral of human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.¹⁴³

Dean Koh points out that the United States' human rights record undermines its ability to negotiate and engage in diplomatic relations with other countries.¹⁴⁴ If the United States is ever to become a pillar of international human rights, it ought to begin that process by ratifying the ICESCR.

D. *Rights, or Wrongs?*

When addressing the dire consequences of poverty, there is no place at the table for identity politics. A person who lives in poverty is a victim of human rights violations, regardless of that person's age, sex, race, religion, or national origin. This is not a case where social movement is likely or possible; there is no cohesive group whose goals are likely to be co-opted by ratification. The progressive implementation process of the ICESCR ought to alleviate the United States' concerns about perceived threats to sovereignty. Yet no progress can be seen in any domestic efforts to reduce or eradicate poverty.

The root of the problem may be that the United States still does not accept the notion of economic, social, and cultural rights as rights.¹⁴⁵ If

143. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002) (pointing out that the United States is "one of only two nations in the world that has failed to ratify the International Convention on the Rights of the Child (the other being Somalia, which until recently did not even have an organized government!)").

144. "[I]mportant meetings between America and its allies are increasingly consumed with answering official protests against the death penalty. [Koh has] little doubt that America's continuation of the practice has undermined our claim to moral leadership in international human rights, and probably contributed to our recent, stunning loss of the United States' seat on the United Nations Human Rights Commission." *Id.* at 310.

145. As Jeremy Bentham wrote:

so, perhaps “rights talk” should be put aside in favor of a conversation about doing the right thing. This is internalization of international norms, as embodied in the ICESCR, at its best.

Professor Ronald Dworkin proposes two fundamental principles for government action, both of which can and should be applied to the United States’ failure to ratify the ICESCR. “First, government must show equal concern for the fate of every person, every citizen over whom it claims dominion. Second, government must respect the responsibility and right of each person to make something of value out of his or her life.”¹⁴⁶ Professor Dworkin refers to a unity of values to signify the notion that despite the diversity of humanity, there are moral and/or ethical values that are shared or that we can, and should, work toward sharing.¹⁴⁷ Toward this end, Professor Dworkin proposes two guiding principles, and two alone, that can allow for the full and progressive realization of all human rights:

The first is a principle of self-respect. You have a responsibility to take your own life seriously—to think it matters how you live—not if and because you happen to want to live well but because that is your responsibility. You must try to give value to your life. . . . The second ethical principle matches the other sovereign principle of political morality. We must accept a responsibility to identify for ourselves

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights;—a reason for wishing that a certain right were established, is not that right—want is not supply—hunger is not bread.

JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* VOL. II 501 (1837).

146. Ronald Dworkin, Keynote Address, *Justice for Hedgehogs*, 90 B.U. L. REV. 469, 470 (2010). In terms of distributive justice, Prof. Dworkin notes that “every distribution [of a nation’s resources] has to be justified by showing how it respects these two fundamental principles.” *Id.* The source of the title *Justice for Hedgehogs* is this ancient maxim: “The fox knows many things, but the hedgehog knows one big thing.” Archilochus (7th-century B.C.E). The one big thing the hedgehog apparently knows is that every human being shares the right to live well and the responsibility to see that others are also allowed to live well. *Id.* The book was the subject of a conference at Boston University’s School of Law on September 25 and 26, 2009 (which I had the great privilege of attending); the papers presented at that conference form Volume 90 of the Boston University Law Review, published in April of 2010.

147. *Id.* at 475.

Though we cannot demand agreement from our fellow citizens, we can demand responsibility and we must therefore develop a theory of responsibility in sufficient detail so that we can say to some people, “I disagree with you, but I recognize the integrity of your argument. I recognize your responsibility.” Or, “I agree with you, but you’ve thrown a coin or you’ve listened only to Fox News, and therefore you’ve acted irresponsibly in forming your opinion.”

Id.

what counts as living well, what performance would give us adverbial value in living. We must do that for ourselves; we must not delegate it or subordinate ourselves to others.¹⁴⁸

In terms of human rights, Professor Dworkin explains that “I can appeal to Kant to say that you must accept that what *makes* these principles true for you is your humanity: the fact that you have a life to lead and a death to face. That is something you share with all other human beings.”¹⁴⁹

In this respect, Professor Dworkin’s version of “living well” and ensuring that others do the same is, as it has been pointed out, in line with philosophers dating back to Aristotle: “Dworkin—like Aristotle—views ethics and morality as deeply complementary.”¹⁵⁰ Thus, how we live and how we treat others are inextricably related to one another. Furthermore, ethics and morality, as previously noted, may not necessarily involve legislation. It may be as simple as “Do unto others as you would have them do unto you,” some form of which is present in many religious and moral structures.¹⁵¹ Living well, as Professor Dworkin points out, is the shared right and responsibility of all human beings, and it cannot be delegated to the law alone.¹⁵²

148. *Id.* at 476.

149. *Id.* at 475 (emphasis in original).

150. Christine Jolls, *Dworkin’s “Living Well” and the Well-Being Revolution*, 90 B.U. L. REV. 641, 641 (2010). Prof. Jolls quotes Dworkin’s *Justice for Hedgehogs* manuscript as saying that the “truth about living well and being good . . . is not only coherent but mutually supporting.” *Id.* at 642.

151. See *Shared Belief in the Golden Rule*, RELIGIOUSTOLERANCE.ORG ONTARIO CONSULTANTS ON RELIGIOUS TOLERANCE, <http://www.religioustolerance.org/reciproc.htm> (last visited Dec. 16, 2010) (noting the Golden Rule is also known as the “Ethic of Reciprocity” and is present in “almost all organized religions”). For example, “Hurt not others in ways that you yourself would find hurtful” (Buddhism); “This is the sum of duty: do not do to others what would cause pain if done to you” (Hinduism); “None of you [truly] believes until he wishes for his brother what he wishes for himself” (Islam). *The Golden Rule, Passages from Various Religious Texts*, RELIGIOUSTOLERANCE.ORG, <http://www.religioustolerance.org/reciproc2.htm> (last updated April 2, 2010).

152. See Ronald Dworkin, Keynote Address, *Justice for Hedgehogs*, 90 B.U. L. REV. 469, 476 (2010) (connecting his claims for ethical, moral, and political unity). This is not to say that government has no role to play in helping its citizens live well:

We can and must [reconcile politics and personal morality] by accepting that this situation can be legitimate only if everyone participates as an equal in . . . three dimensions . . . equality of vote, equality of voice, and equality of stake. Equality of stake means that when we act together in politics, collectively, we must treat each of us as individuals with equal concern.

Id. at 477. Thus, political and personal moralities are inseparable: we are the government, and the government is us. *Id.*

The rights that are provided for in the ICESCR would be realized fully if Professor Dworkin's two main principles of ethics were adopted and followed in the United States or any other nation or culture. The Covenant itself would be redundant if everyone lived well and undertook the responsibility of seeing that others also lived well. And here, living well does not equate to absolute income equality. Again, lack of money is just one facet of poverty. Living well has been measured by various means,¹⁵³ but at its heart lies the notion of living up to one's potential. That's all. And when seen in those terms, we can only wonder, again, what the United States has to lose in ratifying this Covenant.

The system of progressive implementation of the Covenant is consistent with Professor Dworkin's views on rights and responsibilities. Just as the ICESCR requires each state party to implement the Convention's requirements "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" in the Covenant,¹⁵⁴ so Professor Dworkin recognizes the fluid and evolving nature of customary norms or unity of values.¹⁵⁵ His fundamental principles of law, morality, and ethics "seem[] to be less a work of public philosophy so understood than a form of philosophy that simply and vigorously argues for the truth of the matter—and for the unity of value across ethics, morality, justice, and law—irrespective of what anyone who vigorously disagrees might think!"¹⁵⁶ Professor Dworkin concludes that some disagreement about human rights is inevitable but not undesirable: moral reasoning is interpretive reasoning; we will always need to have the conversation about what is good and what is not, what is true and what is false.¹⁵⁷ The important thing is that the movement is in the right direction and that the conversation about human rights (and consequently justice, morality, and ethics) is ongoing.¹⁵⁸

153. See RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL* 25 (2009); see also Christine Jolls, *Dworkin's "Living Well" and the Well-Being Revolution*, 90 B.U. L. REV. 641, 650–51 (2010).

154. International Covenant on Economic, Social and Cultural Rights, art. II, ¶ 1, adopted Dec. 16, 1966, 993 U.N.T.S. 3.

155. See generally Ronald Dworkin, Keynote Address, *Justice for Hedgehogs*, 90 B.U. L. REV. 469 (2010).

156. James E. Fleming, *Taking Responsibilities As Well As Rights Seriously*, 90 B.U. L. REV. 839, 855 (2010).

157. See Ronald Dworkin, Keynote Address, *Justice for Hedgehogs*, 90 B.U. L. REV. 469, 475 (2010).

158. As Prof. Dworkin noted elsewhere, "There is a rap against equality: that accepting equality as an ideal, even one among others, means [leveling] down and requiring everyone to live the same kind of life. But the conception of equality I've been relying on has quite the opposite character: it is dynamic and sensitive to people's differing convictions about how to live." Ronald Dworkin, *Justice in the Distribution of Health Care*, 38 MCGILL L.J. 883, 897–98 (1993). In this essay, Prof. Dworkin addressed the Clinton ad-

There is no role in this scenario for identity politics, which has been described as:

[T]he mobilization around gender, racial, and similar group-based categories in order to shape or alter the exercise of power to benefit group members. These days, identity politics infuse debates over electoral politics, jury selection, school curricula, law school hiring practices, and even casting of Broadway plays. Identity politics help people overcome a sense of anonymity and anomie while also giving shape to perceptions of unequal power and recognition. Identity politics also stimulate controversy, largely by those who claim it undermines unity, individualism, or a nationalism founded upon individualism.¹⁵⁹

The notion of identity politics arose from the injustices or discrimination imposed on a group of similar, or similarly situated, individuals: women, religious or racial minorities, or even members of various political parties.¹⁶⁰ However, even one who is sympathetic to and understanding of the underlying need for group identity and solidarity might have problems with the practice of identity politics. As Professor Martha Minow has noted, there is a “tendency to ‘essentialize.’”¹⁶¹ This involves reducing a complex person to one trait—the trait drawing that person into membership in a particular group—and then equating that trait with a particular viewpoint and stereotype.¹⁶² Furthermore, according to Professor Minow, identity politics ignore “‘intersectionality,’” which “refers to the way in which any particular individual stands at the crossroads

ministration’s (ultimately unsuccessful) efforts to reform health care in the United States. The essay is particularly interesting in light of the controversy that raged around the passage of health care reform by the Obama administration.

159. Martha Minow, Speech, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 648–49 (1996) (footnotes omitted).

160. *Id.* at 651. “These developments reflect longstanding struggles to overcome historic exclusions of African Americans and women from jury participation, from voting, and from the full status of citizenship . . . The insistence on group identity claims also reflects efforts to expose allegedly universal guarantees as partial and discriminatory in practice.” *Id.* (footnote omitted).

161. *Id.* at 653.

162. *Id.* Prof. Minow mentions Justice Clarence Thomas and former Prime Minister Margaret Thatcher as members of minority groups who do not represent the traits that their membership in the group might be thought to entail. (While women are not a “minority” in the world, Margaret Thatcher was the first, and so far only, woman elected Prime Minister of Great Britain, so for these purposes she can be legitimately viewed as being a member of a minority group.) Justice Thomas writes judicial opinions that are more politically conservative than might be expected for an African American man; Margaret Thatcher was consistently more politically conservative than a woman of her generation and position might have been expected to be.

of multiple groups. All women also have a race; all whites also have a gender; and the individuals stand in different places as gender and racial politics converge and diverge.”¹⁶³ Professor Minow notes a third problem with identity politics, and that one stems from the identification itself: “Consider the tensions among self-identification, assignment by self-claimed group members, and assignment by self-claimed group opponents. You say you are a Choctaw, but do the Choctaws say so? The Catholics claim you, but do you claim them? The Apartheid government declared you to be colored, whether you did or not.”¹⁶⁴

Identity politics, for all their noble origins, have no place in the pursuit of economic, social, or cultural rights. The “focus on ethnic, racial, and gender identities distracts attention from economic disparities.”¹⁶⁵ Whatever group’s identity is involved, there will be members of that group living in poverty in the United States: men, women, children, Whites, Blacks, Latinos, Asians, Native Americans, Christians, Jews, Muslims, disabled, able-bodied, unemployed and employed, and so on ad nauseam. As has been noted, “Who got seated at the table and in what order mattered less if the table was piled high.”¹⁶⁶ In the United States today, the table is not piled high for millions of people across all groups. To engage in identity politics while people of every color, sex, religion, ethnicity, etc. go hungry, go without health care, adequate food, or adequate shelter is futile. It is time to move beyond identity politics and address the economic, social, and cultural rights of every American.

Not all group action and identity is negative. Cass Sunstein describes “good extremism” and notes that “[s]ometimes extreme movements are good, even great. When people shift from indifference to intense concern with local problems, such as poverty and crime, group polarization is an

163. *Id.* at 655.

164. Martha Minow, Speech, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 657 (1996). Prof. Minow notes that boundaries or borders shift as they are crossed, and uses as an example a person who is born into a body of the wrong sex and then undergoes sex-changing surgery. Neither sex nor race has an immutably fixed and permanent border.

165. *Id.* at 653. It should be clearly noted here that group membership is not the problem; there are many advantages to group membership. But the focus on historical identities of ethnicity, race, and sex does not help when the subject is economic, social, or cultural rights. “Even if people joined together for different reasons, a shared goal could produce collective efforts and also the kinds of common experiences that can nurture trust. But this does not seem to describe contemporary American politics.” *Id.* at 675.

166. TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* 232 (1995). Prof. Gitlin begins his book with a vivid description of the battle to find a “culturally sensitive” middle school history textbook in Oakland, California; every conceivable group objected to the selected book because it trivialized, marginalized, or ostracized its members’ place in the described history. *Id.*

achievement, not a problem.”¹⁶⁷ Professor Sunstein notes also that diluting any group of like-minded people causes that group to lose its focus:

If people speak to like-minded people, they are more likely to be energized, and if they are more likely to be energized, they are more likely to become active, politically or otherwise. If people hear the other side and give serious consideration to competing arguments, they may well be more respectful and tolerant—but they are also more likely to be passive and perhaps even indifferent.¹⁶⁸

While this may explain the way identity politics might begin, it also explains the possibility of co-optation that may prove to be the undoing of any social movement. Poor people in the United States do not often have the opportunity to speak to each other because they do not live in concentrated areas to the same extent as they did before the largest public housing complexes were closed.¹⁶⁹ Some poor people are isolated in rural areas, others live in crowded urban centers; some sleep at night in homeless shelters, others on friends’ couches or under bridges. This is not a situation that lends itself to “good extremism.”¹⁷⁰ Instead, this

167. CASS R. SUNSTEIN, *GOING TO EXTREMES, HOW LIKE MINDS UNITE AND DIVIDE* 149 (2009).

168. *Id.* at 151. Prof. Sunstein cites DIANA MUTZ, *HEARING THE OTHER SIDE* (2006).

169. For an excellent discussion of the role of group identity among public housing tenants in Chicago’s most notorious public housing project, Cabrini-Green, see Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago’s Public Housing Reform Experiment*, 16 *GEO. J. ON POVERTY L. & POL’Y* 117, 157 (2009). Prof. Alexander describes the important role played by the Local Advisory Council (LAC), a group of public housing tenants, in the revitalization of Cabrini-Green. *Id.* at 170–74. If these tenants had not lived in close physical proximity to one another, it would probably not have been possible for them to organize at all, let alone to organize effectively enough to file a lawsuit to ensure that they had a role in the redevelopment process. Yet the ultimate goal of the redevelopment was to disburse these tenants into much smaller housing units, thus effectively ensuring that they will not, in the future, have the group identity that made their organization possible the first time.

170. Affordable housing is, of course, a primary concern in any conversation about poverty in America. The National Coalition for the Homeless says:

Declining wages have put housing out of reach for many workers: in every state, more than the minimum wage is required to afford a one- or two-bedroom apartment at Fair Market Rent. . . . In fact, in the median state a minimum-wage worker would have to work 89 hours each week to afford a two-bedroom apartment at 30% of his or her income, which is the federal definition of affordable housing.

Who is Homeless?, NAT’L COAL. FOR THE HOMELESS (July 2009), <http://www.nationalhomeless.org/factsheets/who.html> (citations omitted). Furthermore, according to the National Coalition, the following groups are most at risk of homelessness in the United States: Children under the age of 18, single men, families with children, African-Americans, victims of domestic violence, veterans, people with addictions, the disabled, and low-wage workers. *Id.* This indicates that there is not any one group that might be motivated to “good extremism” on issues of poverty.

looks more like a situation in which the lack of a group identity would be a good thing because it embodies the concept of intersectionality to which Professor Minow refers.¹⁷¹ In a group as diverse as the poor in the United States, there really is no place for identity politics.

V. CONCLUSION

More than forty years have passed since the United States declared War on Poverty.¹⁷² Nearly that many years have passed since President Jimmy Carter signed the ICESCR.¹⁷³ The United States remains ambivalent, at best, about the very existence of economic rights.¹⁷⁴ It will take

171. See Martha Minow, Speech, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 655 (1996).

172. President Lyndon B. Johnson signed the Economic Opportunity Act of 1964, 42 U.S.C. § 2701, on August 20, 1964. President Johnson introduced the War on Poverty in remarks made to Congress on March 16, 1964:

Because it is right, because it is wise, and because, for the first time in our history, it is possible to conquer poverty, I submit, for the consideration of the Congress and the country, the Economic Opportunity Act of 1964. . . . What you are being asked to consider is not a simple or an easy program. But poverty is not a simple or an easy enemy. It cannot be driven from the land by a single attack on a single front. . . . Nor can it be conquered by government alone. . . . And this program is much more than a beginning. Rather it is a commitment. It is a total commitment by this president, and this Congress, and this nation, to pursue victory over the most ancient of mankind's enemies.

Lyndon B. Johnson, *Special Message to Congress Proposing a Nationwide War on the Sources of Poverty* (Mar. 16, 1964), THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=26109&st=war+on%2Fpoverty&st1=> (last visited Dec. 16, 2010).

173. Speaking at Notre Dame's commencement in 1977, President Carter said:

We can no longer separate the traditional issues of war and peace from the new global questions of justice, equity, and human rights. It is a new world, but America should not fear it. It is a new world, and we should help to shape it. It is a new world that calls for a new American foreign policy—a policy based on constant decency in its values and on optimism in our historical vision.

Jimmy Carter, President of the United States, Address at the Commencement Exercises at the University of Notre Dame (May 22, 1977), in PUBLIC PAPERS OF THE UNITED STATES: JIMMY CARTER 1977, VOL. 1, 1977, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=7552>. In this same address, President Carter described the United States' foreign policy as one that would be "rooted in our moral values, which never change." *Id.* at 961. History has not always been kind to President Carter, but his morals have never been legitimately questioned.

174. See Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & The Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 560 (2003).

Unfortunately, in America today, the working poor struggle to stretch inadequate pay to cover the basic necessities of life such as food and shelter. The plight of the poor in America looks all too similar to years past. It brings to mind President Roosevelt's

more than treaty ratification or subsequent implementing legislation and litigation to bring about meaningful change for the poor in this nation.¹⁷⁵ “Without the buy-in of those who must implement reforms, institutional culture is unlikely to change very much and little change of lasting significance is likely to be accomplished in the end.”¹⁷⁶ Nevertheless, ratification of the ICESCR, followed by enactment of implementing legislation, would be an appropriate and effective next step for the United States to take toward the eradication of poverty in this country.¹⁷⁷ The United States can and should begin immediately to work toward progressive implementation of the basic human rights described in the ICESCR.¹⁷⁸

call for Congress to act in the face of hunger and unemployment: “We cannot be content, no matter how high [the] general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.”

Id. at 558 (citing Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), available at <http://www.udhr.org/history/1-11-44.htm>).

Prof. Keller’s article concludes that:

It is a disgrace that the richest country on the world has the industrialized world’s highest rate of child poverty, hunger, and homelessness. It is also a betrayal of the foundations of American democracy. This rejection of economic rights flies in the face of international law and the principles of the Declaration of Independence. . . . [American politicians] have been particularly antagonistic to the notion that basic human rights include the right to food, shelter or employment.

Id. at 559. Furthermore, she notes that “the United States refuses to recognize that the political rights so cherished by American politicians are meaningless to a child who is hungry, or an adult who is working forty hours a week, but cannot afford to keep a roof over her family.” *Id.* at 561.

175. See Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 323–24 (2007). Prof. Carle observes that “judicial decrees are not well suited to addressing ‘second generation’ problems structural reform of institutions, such as eliminating manifestations of race and gender inequality that persist despite laws banning discrimination. These complex, intractable problems require nuanced remedial strategies tailored to particular settings. Courts lack this kind of remedial flexibility.” *Id.* (footnotes omitted). These observations about race and gender are equally true of the United States’ responses to poverty.

176. *Id.* at 325.

177. It has been suggested that the United States could ratify the ICESCR and then “delegate implementation to the states.” Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HASTINGS L.J. 79, 88 (1992). Prof. Stark describes a “core compatibility between state constitutions and the ICESCR. . . . Ratification of ICESCR would facilitate and expedite a progression that is not only increasingly urgent but perhaps already inevitable.” *Id.* at 128.

178. This has been described as “the challenge to implement economic, social, and cultural rights with the same level of effectiveness and success that the [human rights] movement has achieved with respect to civil and political rights It is . . . a way to abandon the idea of ‘generations of rights’ which, whatever the original intent of the authors, has resulted in practice of considering economic, social, and cultural rights as ‘second

The Rule of Law is one star in a constellation of ideas that dominate our political morality: the others are democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organize their economies around free markets and private property to the extent that this can be done without seriously compromising social justice, and we want them to be governed in accordance with the Rule of Law.¹⁷⁹

There is no reason for the United States to resist ratification of the ICESCR,¹⁸⁰ and many reasons ratification would be a good thing. We must begin somewhere to work toward achieving the shared values that compel us to address the problems that poverty needlessly causes in our abundantly wealthy nation.¹⁸¹ We need not, in fact, always have the poor among us.

category' rights." Juan E. Mendez, *International Human Rights: The 60th Anniversary of the UDHR*, 30 U. PA. J. INT'L. L. 1157, 1162 (2009). Mr. Mendez also urges nations to "make 'progressive realization' (the standard used in the ICESCR) more than a platitude or aspiration, through effective public policy measures. [This] demands an effort of imagination and legal thinking to devise formulas by which these rights can be 'justiciable,' i.e., subject to specific court-ordered redress in case of violation." *Id.* This is considered to be one of the "new horizons" of human rights protection. *Id.* at 1163.

179. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, presented at the annual meeting of the American Society for Political and Legal Philosophy, New Orleans, La., Spring, 2011 (forthcoming in NOMOS).

180. See NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 65–116 (1990) (discussing the "Legacy of Fear" and the Bricker Amendment that provide the context for the United States' antiquated aversion to joining human rights treaties).

181. See generally RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL* 25 (2009). The wealth of a nation, like the wealth of an individual, is a relative thing. See *id.* The United States may not feel as affluent as it did five years ago, but compared to the rest of the world we remain extremely wealthy. See generally *id.*